(1)

Supreme Court, U.S.
FILED

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No.

IN THE

# Supreme Court of the United States

TOM EASTON and ELENA EASTON,
and as successors in interest of decedent
MARGARETHA MARY WINCHESTER,
*Petitioners,*

v.

JIM MAREADY, DEL NORTE SHERIFF;
DEPUTY SHERIFF THOMAS HOCKABOUT;
DEPUTY SHERIFF GERALD HARWOOD;
DEPUTY SHERIFF GARTH GOODRICH;
STEPHAN BROHMER, DIRECTOR DEL NORTE
ADULT PROTECTIVE SERVICES; each in their
individual and official capacity.

On Petition For Writ of Certiorari
To The Court of Appeal of the State of California

## PETITION FOR WRIT OF CERTIORARI

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22 pp

## QUESTIONS PRESENTED FOR REVIEW

1. May California's Elder Abuse Act legislate away the Fourth Amendment rights of an elder citizen to be free of warrantless entry and seizure by granting absolute immunity to law enforcement officers who have seized an 88 year old dying woman from her own bed in her own home and transported her to a local hospital, where she was intubated and restrained for three days?

2. May California's Elder Abuse Act legislate away an elder patient's right to refuse unwanted medical treatment under the Patient Self Determination Act, 42 U.S.C. § 1395cc(f)(1)(A)(i) without violating her civil rights under 42 U.S.C. § 1983?

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IN THE

# Supreme Court of the United States

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TOM EASTON et al.,

*Petitioners,*

v.

JIM MAREADY, DEL NORTE SHERIFF; et al.

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PETITION FOR WRIT OF CERTIORARI

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## I. INTRODUCTION

The State of California's Elder Abuse Act has legislated away the one of the most sacred rights of citizens in a free country: the Fourth Amendment right of all citizens to be safe and secure in their own homes from any warrantless invasion by law enforcement.

The same provision of the Elder Abuse Act further abridges a patient's federal right to refuse unwanted medical treatment under the Patient Self Determination Act of 1990, 42 U.S.C. § 1395cc(f)(1)(A)(i)).

The California Court of Appeal held that law enforcement had absolute immunity under the Elder Abuse Act's subsection 15634(b), to enter a private home without warrant and seize the dying woman against her will and that of her caretakers. The California Supreme Court denied review.

## II. BASIS FOR JURISDICTION

The unpublished opinion of the California Court of Appeal was filed November 28, 2001 [Appendix 1-10].

The Petition for Review in the California Supreme Court was denied March 13, 2002 [Appendix 11].

This Petition for Certiorari under Rule 10 for federal civil rights questions is timely under Rule 13.1 as less than 90 days from denial by the state court of last resort.

## III. STATEMENT OF THE CASE

On October 20, 1998, three deputy sheriffs forcibly entered petitioners' home in Crescent City, California, without search warrant or consent accompanied by two Emergency Medical Technicians (EMT's).

The deputies directed the EMT's to transport petitioner's mother, 88 year old Margaretha Winchester, against her will to the local hospital, Sutter Coast Hospital in Crescent City.

Winchester was restrained and intubated for three days before being allowed to return to her home, where she died nine days later of functional old age.

Petitioners brought this action on September 2, 1999 under 42 U.S.C. § 1983 for violations of civil rights and right to refuse unwanted medical treatment.

On October 25, 2000, the trial court granted defendants' motion for summary judgment.

Petitioners timely appealed. The California Court of Appeal, First Appellate District, issued its unpublished opinion on November 28, 2001 [Appendix 1-10]. The California Supreme Court denied review on March 13, 2002 [Appendix 11].

## IV. SUBSECTION 15634(b) OF CALIFORNIA'S ELDER ABUSE ACT IS UNCONSTITUTIONAL

California's Elder Abuse Act is unconstitutional insofar as it abridges any citizen's rights under the Fourth Amendment. More specifically, this subsection:

> "**Any** care custodian, health practitioner, or **employee of** an adult protective services agency or **a local law enforcement agency who, pursuant to a request from** an adult protective services agency or **a local law enforcement agency, provides the requesting agency with access to the victim** of a known or suspected instance of elder or dependent adult abuse **shall not incur civil or criminal liability as a result of providing that access.**" § 15634(b). [Emphasis added]

Yet the California Court of Appeal ignored the patent unconstitutionality and held that:

> ". . . (§ 15634, subd. (b).) . . . In the case before us, we conclude that the same statute also provides **absolute immunity** to the sheriff's deputies who entered the home without a warrant in order to allow those paramedics to remove Winchester." *Easton v. Maready*, 2001 Cal. App. LEXIS 2669,*8-9, Appendix at 7. [Emphasis added]

It appears an absurd reading in light of Fourth Amendment jurisprudence that any California statute

may allow law enforcement to enter a dwelling without warrant or exigent circumstance.

A line of cases in the Ninth Circuit, based on this Court's holding in *Camara v. Municipal Court*, 387 U.S. 523 (1967), demonstrates that administrative searches and seizures must follow the requirements of the Fourth Amendment.

Thus in a recent case, where the issue was whether a social worker and a police officer were entitled to qualified immunity, the Ninth Circuit Court of Appeal correctly stated the law under *Camara*:

> "The principle that government officials cannot coerce entry into people's houses without a search warrant or applicability of an established exception to the requirement of a search warrant is so well established that any reasonable officer would know it . . . appellants' claim, that 'a search warrant is not required for home investigatory visits by social workers,' is simply not the law." *Calabretta v. Floyd*, 189 F.3d 808, 813 (1999).

This Court should find that the statute, as drafted by the California legislature and as interpreted by the Court of Appeal, unconstitutionally deprives elder citizens of their rights under the Fourth Amendment to be safe and secure in their own homes.

## V. THE PATIENT'S BILL OF RIGHTS, AS WELL AS THE ELDER ABUSE ACT ITSELF, ALLOWS ANY VICTIM TO WITHHOLD CONSENT

In *Crusan v. Missouri Department of Health*, 497 U.S. 261 (1990), this Court held that any person has a protected liberty interest in refusing unwanted medical care. This right to decline medical treatment was thereafter enacted into federal law in 1990 in the Patient Self Determination Act:

> "(A) to provide written information to each such individual concerning - (i) an individual's rights under State law (whether statutory or as recognized by the courts of the State) to make decisions concerning such medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives (as defined in paragraph (3)). . ." 42 U.S.C. § 1395cc(f)(1)(A)(i).

The Sutter Coast Hospital to which Winchester was taken had in fact the week before provided her with a written statement of that right to refuse treatment:

> "You can say no to any treatment you don't want - - even if the treatment will keep you alive longer." CT 506.

There can be no question that Winchester refused her consent to be taken away for unwanted medical treatment.

The report of EMT Debbie Snow fully corroborated petitioners' testimony that Winchester refused treatment and hospitalization by shaking her head "no"

in response to questioning by the EMT:

> "PT [patient] LET US TAKE HER V.S. [vital signs] **BUT THEN WHEN I TOLD HER I WOULD LIKE TO TAKE HER S.C.H.** [Sutter Coast Hospital] **SHE PULLED AWAY FROM ME. I ASKED IF THAT WAS O.K. TO TAKE HER AND SHE SAID SHOOK HER HEAD NO. AFTER THAT PT WOULDN'T LET ME RECHECK V.S. OR ANY THING. SHE WOULD JUST PULL AWAY**. . . . AS WE WERE LEAVING THE SON SAID THIS WAS AGAINST HIS WHISHES (sic) AND HIS MOTHERS. HE HUGGED HER AND KISSED HER AND SAID THAT WE SHOULD BE ASHAMED OF OUR SELF'S (sic)." EMT REPORT OF DEBBIE SNOW, CT 503-504. [Emphasis added]

The Elder Abuse Act further provides elsewhere, and ignored by the Court of Appeal's decision, that any alleged victim of elder abuse may refuse consent:

> **"Any victim of elder or dependent adult abuse may refuse or withdraw consent at any time** to an investigation or the provision of protective services by an adult protective services agency or long-term care ombudsman program. **The adult protective services agency shall act only with the consent of the victim** . . ." W&I 15636 (a).[Emphasis added]

## VI. CONCLUSION

Any elderly person in California is now in jeopardy of being arbitrarily seized, even out of his or her own home, and forced into unwanted medical treatment.

This makes a mockery of the law, both of the federal right to refuse unwanted medical treatment and of one of our most precious freedoms: to be safe and secure in our homes under the Fourth Amendment.

Subsection 15634(b) of the Elder Abuse Act, as interpreted by the California Court of Appeal, is facially unconstitutional under 42 U.S.C. § 1395cc(f)(1)(A)(i) and the Fourth Amendment. Petitioners request that this Court grant this Petition for Writ of Certiorari to the California Court of Appeal.

Dated: May 22, 2002.

Respectfully submitted,

TOM EASTON
*Counsel of Record*

TOM EASTON et al., Individually and as Successors in Interest, etc., Plaintiffs and Appellants, v. JIM MAREADY, as Sheriff, etc., et al., Defendants and Respondents.

A093279

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

2001 Cal. App. LEXIS 2669

November 28, 2001, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR PURPOSES OF RULE 977.

PRIOR HISTORY: (Del Norte County Super. Ct. No. 990443).

JUDGES: Reardon, Acting P.J. We concur: Sepulveda, J., Kay, J.

OPINION BY: Reardon

OPINION:

The trial court granted the motion for summary judgment filed by respondents Del Norte County Sheriff Jim Maready and other officials, entering judgment

against appellants Tom and Elena Easton on their suit alleging federal civil rights violations. The Eastons appeal the subsequent judgment in favor of Maready and the other officials, contending inter alia that the Elder Abuse and Dependent Adult Civil Protection Act (the Act) did not confer governmental immunity on the officers. (See Welf. & Inst. Code, n1 §§ 15601-15660.) We disagree, finding that the sheriff and other county officials enjoyed an absolute immunity against [*2] liability. Thus, we affirm the judgment.

----------Footnotes----------

n1 All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

----------End Footnotes----------

I. FACTS

Margaretha Winchester--an elderly woman who had suffered from dementia since 1991--resided at her Crescent City home with her son, appellant Tom Easton, and his wife Elena. On September 26, 1998, n2 the 88-year-old Winchester collapsed

PAGE 2 2001 Cal. App. LEXIS 2669, *2

outside the residence after returning from a walk. Her condition began to decline rapidly after this incident. The Eastons believed that Winchester was dying. On October 13, she was treated at a hospital. On discharge, she was prescribed medication for a urinary tract infection. A home health care worker was to visit regularly for a week to allow the Eastons to become familiar with the routine required to care for Winchester's condition. On October 19, a heath care worker discovered that Easton had not filled the prescription to treat his mother's infection.

- - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n2 All dates refer to the 1998 calendar year unless otherwise indicated.

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - -

[*3]

By October 20, Winchester's condition had gone untreated for a week. On that day, Easton disagreed with health care officials about her medical treatment. A health care official urged Easton to bring Winchester to the hospital for treatment of her infection, but Easton did not want to have medical personnel attend her and prolong her life a few days or weeks longer. Winchester's physician contacted the emergency number for the Del Norte County Sheriff and reported that Easton would not allow medical personnel to treat Winchester's acute, but treatable urinary tract infection, suggesting that his neglect constituted elder abuse. She also reported that Easton would not allow Winchester's prescriptions to be filled and suggested that Easton might be using Winchester's pension in an improper manner. Finally, she told the sheriff's office that Winchester's infection posed a risk of falling blood pressure which could be life-threatening. The doctor asked to have Winchester brought to the hospital.

By 6:30 p.m. that evening, three Del Norte County Deputy Sheriffs--Thomas Hockabout, Gerald Harwood and Garth Goodrich--were dispatched to the Easton home in response to the physician's call. [*4] Hockabout entered the house and evaluated Winchester's condition, concluding that she was severely disabled--both mentally and physically. She appeared to him to be in very poor health--malnourished, weak and frail--as well as completely unresponsive to questioning. An emergency medical technician reported that Winchester's blood pressure was very low. Hockabout

concluded that Winchester was unable to understand the risks to her health, and that there was an immediate risk to her life and/or physical well-being. Hockabout allowed emergency medical personnel to transport Winchester to the hospital by ambulance.

On October 21, Easton filed a civil rights action against the hospital, ambulance and medical personnel. (See Easton v. Sutter Coast Hospital (2000) 80 Cal.App.-4th 485, cert. den. 531 U.S. 1084, 148 L. Ed. 2d 686, 121 S. Ct. 790 (Easton I). Winchester was released from the hospital on October 23. She died on November 1. The Eastons filed a government tort claim in February 1999. The Del Norte County Board of Supervisors denied the claim in March 1999.

In September 1999, the Eastons brought a civil rights action for damages against the three [*5] deputies who responded to their home. They sued individually and as successors in interest of Winchester. (See 42 U.S.C. § 1983.) It alleged that Hockabout, Harwood and Goodrich violated their civil rights, individually, and those of the deceased Margaretha Winchester, for whom



they served as successors in interest. The Eastons alleged that the deputies made a warrantless entry into their home without their consent and caused emergency personnel to trespass into it for the purpose of falsely imprisoning Winchester. The complaint also named Del Norte County Sheriff Jim Maready and Del Norte County Department of Social Services Director Stephen Brohmer as defendants, alleging that they each owed a duty to train and supervise the deputies, which they breached. In October 1999, the officials answered the complaint, denying the allegations and offering various affirmative defenses, including governmental immunity.

In April 2000, we issued our decision in Easton I, upholding a judgment of dismissal of the action that the Eastons filed against the medical officials who prompted the Del Norte County Sheriff's office to enter the home and remove Winchester to a [*6] hospital. In May 2000, the county officials moved for summary judgment in the suit now before us.

In June 2000, the trial court held argument on the motion for summary judgment and in July 2000, it issued a notice of its intended decision to grant the motion. The defendants were permitted to amend their answer to add an allegation of absolute immunity pursuant to section 15634, subdivision (b). In September 2000, the trial court held a second hearing on the motion, indicating that the decision in Easton I resolved the issues in the case at bar as well. Easton argued that our decision misinterpreted the Act and should not be followed.

The trial court rejected this argument and granted the motion for summary judgment. It found that the deputies did not need a warrant to enter the Easton home because they did so pursuant to the emergency exception to the warrant requirement. The trial court concluded that Deputy Hockabout provided access to transport Winchester to the hospital based on his reasonable belief that she was gravely disabled as the result of a mental disorder. It also concluded that the deputies were immune from liability pursuant to section 15634, subdivision (b) and [*7] our decision in Easton I. Finally, it found the deputies immune under qualified immunity afforded to government officials under federal law.

The trial court also concluded that Maready and

Brohmer were entitled to summary judgment. It found that neither Maready nor Brohmer had any knowledge of the events of October 20 until after they occurred and, thus, were not active participants in those events. They had no direct supervision or training responsibilities for the responding deputies. The trial court found no facts suggesting a pattern and practice of inadequate training of deputies with regard to the issues raised in the Eastons' complaint. The trial court found no triable issues of material fact as to all of the causes of action alleged against the defendants in the Eastons' complaint. Judgment consistent with this ruling was entered in September 2000.

II. IMMUNITY

A. Responding Deputies

Hockabout, Harwood and Goodrich argue that they are absolutely immune from liability under the Act, citing Easton I. For their part, the Eastons contend that that decision does not apply to this matter. We disagree and conclude that Easton I is dispositive [*8] of the case now before us.

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The Legislature has provided that any local law enforcement agency employee who provides an agency reporting suspected elder abuse with access to the victim of a known or suspected instance of elder or dependent adult abuse shall not incur civil or criminal liability as a result of providing that access. ( § 15634, subd. (b).) In Easton I, we construed this provision to confer a broad and absolute immunity for persons who provide access to the victims of suspected abuse. ( Easton I, supra, 80 Cal.App.4th at pp. 488-489, 495--

496.) We found that the paramedics who entered the Crescent City residence to remove Winchester to the hospital enjoyed an absolute immunity against claims of trespass and false imprisonment based on their entry of the home without the Eastons' consent. ( Id. at pp. 495-496.) In the case before us, we conclude that the same statute also provides absolute immunity to the sheriff's deputies who entered the home without a warrant in order to allow those paramedics to remove Winchester. As we explained in Easton I, it would undercut the ultimate goal of the Act if it did not protect both those who [*9] report suspected elder abuse and those who intervene in order to protect the victims of suspected elder abuse. ( Easton I, supra, 80 Cal.App.-4th at p. 495; see § 15600, subd. (i).)

The Eastons raise several objections to the application of this provision of the Act. First, they argue that chapter 12 of the Act cannot constitute a basis for immunity because it had not been adopted in Del Norte County and because the county did not comply with the provisions contained in that chapter. (See §§ 15700--15755.) However, this argument is inapplicable to our case, as the statutory immunity set out in section 15634 is contained in chapter 11 of the Act. (See §§ 15600-15660.)

The Eastons also contend that the statutory immunity does not apply because a victim of elder abuse has the right to withdraw consent to services unless criminal conduct has been alleged. (See § 15636, subd. (a).) This argument is based on their assertion that Winchester refused to consent to emergency treatment. However, the trial court found that she had been "completely unresponsive" to Hockabout when he questioned her. The Eastons have not established the factual predicate

of their claimed application [*10] of this provision.

Finally, the Eastons argue that if Winchester was so incapacitated that she could not legally give or deny consent to protective services, the county's only alternative under section 15636 was to appoint a conservator or guardian for her. However, this statute is permissive, providing that a conservatorship or guardianship may be sought. (See § 15636, subd. (b).) This permissive language is inconsistent with the Eastons' contention that seeking a conservatorship or guardianship was mandatory before the county could intervene. The Eastons' apparent claim that no emergency intervention could ever lawfully occur if the alleged victim was so incapacitated that she could not legally give or deny consent to protective services also defies one purpose of the Act, which is "to aid all victims of abuse in a timely, compassionate manner." ( § 15601, subd. (b).) We are satisfied from our reading of the Act that the Legislature contemplated the type of emergency action taken by Del Norte County officials in this matter.

B. Other Officials

The Eastons brought their action against the three responding deputies and two other officials--Del Norte County Sheriff [*11] Jim Maready and Del Norte



County Department of Social Services Director Stephen Brohmer--whom they characterized as having supervisory responsibilities for those deputies which they allegedly failed to properly discharge. The liability of Maready and Brohmer is derivative, based on the actions of the deputies, who enjoy an absolute immunity from liability. Thus, as the responding deputies were immune from liability for their direct actions on October

20, so were Maready and Brohmer absolutely immune from any derivative liability based on their alleged failure to properly supervise and train the deputies.

C. Effect of Immunity

On appeal from a grant of summary judgment, we determine anew whether there is a triable issue of material fact or whether the moving party is entitled to summary judgment as a matter of law. (See Code Civ. Proc., § 437c, subd. (c); Jambazian v. Borden (1994) 25 Cal.App.4th 836, 844; see also Villa v. McFerren (1995) 35 Cal.App.4th 733, 741; Union Bank v. Superior Court (1995) 31 Cal.App.4th 573, 579.) If the moving party meets its burden of showing a complete defense to [*12] the action, then the burden of proof shifts to the opposing party to show that a triable issue of material fact exists as to that cause of action or defense. (See Code Civ. Proc., § 437c, subd. (o)(2); Jambazian v. Borden, supra, 25 Cal.App.4th at pp. 843-844.) The opposing party may not rely on the allegations or denials in the pleadings, but must set forth specific facts showing that a triable issue of material fact exists. (See Code Civ. Proc., § 437c, subd. (o)(2); Union Bank v. Superior Court, supra, 31 Cal.App.4th at p. 590.)

In our case, the moving party--the county officials--established an absolute immunity from liability for all the claims pled. (See § 15634, subd. (b). The Eastons have not established any triable issue of material fact that could override this absolute immunity. To the extent that they raise procedural issues implicating their constitutional right to a jury trial, we find that the summary judgment on liability necessarily precludes trial--before a jury or a court--on the underlying issues. (See AOB 13-21) (See U.S. Const., 5th &

14th Amends.; Cal. Const., art. [*13] I; § 16; Code Civ. Proc., § 437, subd. (c).) The judgment is affirmed.

Reardon, Acting P.J.

We concur:

Sepulveda, J.

Kay, J.

Tom Easton et al., Appellants v. Jim Maready, as Sheriff, etc. et al., Respondents

S103387

SUPREME COURT OF CALIFORNIA

2002 Cal. LEXIS 1704

March 13, 2002, Decided

NOTICE:
[*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY:
Appeal from First Appellate District. Division Four. No. A093279.

OPINION:

Petition for review DENIED.

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DEPUTY SHERIFF GERALD HARWOOD;
DEPUTY SHERIFF GARTH GOODRICH;
STEPHAN BROHMER, DIRECTOR DEL NORTE ADULT
PROTECTIVE SERVICES; and DOES ONE through TEN,
inclusive, each in their individual and official capacity,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA

## BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

Margaretha Winchester resided at her home in Crescent City with her son, plaintiff Tom Easton (Easton), and Mr. Easton's wife, Elena Easton. She had suffered from dementia since 1998. On September 26, 1998, the 88-year-old Winchester collapsed outside the residence after returning home from a walk.

Winchester's physical and mental condition declined rapidly after this incident, and she was treated at a local hospital on October 13. She was prescribed medication for a urinary tract infection and discharged.

Once home, a home healthcare worker (Don Morneau) monitored her condition, with Easton's consent. On October 19, the home healthcare worker discovered that Easton had not filled the prescription to treat his mother's infection. The next day, Morneau strongly urged Easton to take Winchester back to the hospital for treatment of the infection, an easily treatable medical condition. Easton refused and indicated he did not want to have medical personnel attend to her. At this time, Easton did not have a power of attorney to make health care decisions for Winchester and he had not been appointed her guardian. Morneau then told Easton it was his duty to report possible elder abuse.

Morneau then reported the refusal to allow medical care to Winchester's treating physician (Dr. Sara Kossuth). Dr. Kossuth then called 911 and reported that Easton would not allow medical personnel to treat Winchester's infection, also suggesting that his neglect constituted elder abuse. The physician also reported that Winchester's infection posed a risk of falling blood pressure, which could be

life-threatening, and requested that law enforcement personnel intervene and assist in having Winchester brought to the hospital.[1]

Three Del Norte County sheriff's deputies were dispatched to the Easton residence in response to the physician's request. A deputy (Deputy Hockabout) informed Easton that they had been dispatched to assist in having Winchester taken to the hospital for necessary medical care. Hockabout then entered the house, followed by an emergency medical technician (EMT) from Del Norte Ambulance. The EMT reported that Winchester's blood pressure was very low. Deputy Hockabout observed that Winchester appeared in very poor health. She was completely unresponsive to his questions. At all times her eyes were open. She stared directly at him without any response. Deputy Hockabout then concluded that Winchester was severely disabled — both mentally and physically. She appeared malnourished, weak and frail. Deputy Hockabout determined that Winchester was unable to understand the risks to her health, and allowed medical personnel to transport her to the hospital by ambulance.

Petitioners filed suit in the Del Norte County Superior Court, alleging violation of 42 U.S.C. § 1983 based on the Eastons' Fourth Amendment rights. The complaint also alleged that the County violated California's Elder Abuse Act by failing to obtain a search warrant before entering the Easton's home.

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1. In a memo of a prior conference call between Morneau, Dr. Kossuth and Chris Van Camp, a social service worker, it is noted, "Dr. Kossuth wants patient in ER for assessment 'whatever it takes.'"

The state trial court granted respondents' motion for summary judgment and petitioners appealed. In an unpublished opinion[2] ("*Easton II*"), the California Court of Appeal affirmed the trial court's granting of summary judgment, based on an immunity provision in the Elder Abuse Act, previously addressed by the court in *Easton v. Sutter Coast Hospital*, 80 Cal. App. 4th 485 (2000), *cert. denied*, 531 U.S. 1084, 148 L. Ed. 2d 686, 121 S. Ct. 790 (2001) ("*Easton I*"). Both *Easton I* and *Easton II* are based on the same underlying incident, i.e., the removal of Winchester from the Easton residence in order to render medical treatment.

In *Easton I*, the appellate court construed California Welfare and Institutions Code § 15634 (a provision of the Elder Abuse Act) to confer absolute immunity for persons who provide access to victims of suspected abuse. *Id.*, 80 Cal. App. 4th at 495-496. Under the facts presented in this case, the court in *Easton II* concluded that the same statute "provides absolute immunity to the sheriff's deputies who entered the home without a warrant in order to allow [ ] paramedics to remove Winchester." *Easton II*, 2001 WL 1511263 (Cal. App. 1 Dist.), *3.

Petitioners then filed a petition for review with the California Supreme Court, which was denied.

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2. A copy of the decision is attached as an appendix to the petition for writ of certiorari, and is available on Westlaw (2001 WL 1511263).

## REASONS FOR DENYING THE WRIT

### A. The Issues Presented To This Court Were Not Raised Below.

Petitioners present two issues. First, they claim California's Elder Abuse Act is facially unconstitutional under the Fourth Amendment of the United States Constitution. Second, petitioners (apparently) assert that this legislation conflicts with 42 U.S.C. § 1395cc(f)(1)(A)(i), a provision of the Patient Self Determination Act.[3]

Neither of these issues were raised or addressed in the proceeding below.

The complaint alleged respondents violated § 1983 and the Elder Abuse Act, based on the entry into petitioners' residence without a search warrant. Petitioners did not challenge the constitutionality of the Elder Abuse Act, nor did they allege that the Act conflicted with the so-called Patient Self Determination Act.

Likewise, petitioners did not question the validity of the Elder Abuse Act in their brief filed in the California Court of Appeal or their petition for review to the California Supreme Court. To the contrary, they argued that "California law is in accord with federal law" with respect to the right of patients to refuse medical treatment.[4]

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3. The second issue is articulated by petitioners as follows: "May California's Elder Abuse Act legislate away an elder patient's right to refuse unwanted medical treatment under the Patient Self Determination Act, 42 U.S.C. § 1395cc(f)(1)(A)(i) without violating her civil rights under 42 U.S.C. § 1983?"

4. Petitioners' opening brief, filed in the California Court of Appeal, pp. 38-39.

The failure of petitioners to raise either of the issues in the proceedings below is reflected in the Court of Appeal's decision in *Easton II*. That is, a constitutional challenge to California's Elder Abuse Act under federal law was not addressed in that decision, nor does the court indicate that the issue was raised by petitioners. Rather, the issue before the appellate court was whether or not California's Elder Abuse Act provided immunity for respondents.[5]

Petitioners ignore the well-established rule that, on petition for certiorari from state court decisions, this Court does not decide federal issues "not pressed or passed upon below." *Campbell v. Louisiana*, 423 U.S. 392, 401 (1998); *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); *Crowell v. Randell*, 10 Pet. 368, 391-398 (1836). Indeed, the Court has opined that, under 28 U.S.C. § 1257,[6] it lacks jurisdiction to even consider federal questions not raised or decided by the highest state court below. *Crowell*, 10 Pet. at 391; *Whitney v. California*, 274 U.S. 357, 360 (1927); *Cardinale*, 39 U.S. at 438 ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of State court decisions.").

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5. The appellate decision also mentioned, in passing, petitioners' claim that the trial court violated their constitutional right to a jury trial by granting summary judgment 2001 WL 1511263*4.

6. Section 1257 provides that:

> [F]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) by writ of certiorari, . . . where any title, right, privilege or immunity is specially set-up or claimed under the Constitution, treaties or statutes of . . . the United States.

The policies giving rise to the so-called "not pressed or passed upon below" rule were explained by the Court in *Cardinale v. Louisiana*, *supra*:

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionally. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds. [*citation omitted*] They should be given the first opportunity to consider them.[7]

Supreme Court Rule 14 requires that a petition for review of a state court judgment include a statement specifying

> . . . the stage and the proceedings, both in the court of first instance and in the appellate courts, when the federal question sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with

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7. 394 U.S. at 439.

> specific references to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Consistent with Supreme Court Rule 14, courts have held that the petitioner has the burden of demonstrating to this Court that the federal questions were raised or decided by the state court below. *Street v. New York*, 394 U.S. 476, 482 (1969); *Campbell*, 523 U.S. at 401; *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974). This Court has also stated that, when "the highest court has failed to pass upon a federal question, it will be *assumed* that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street*, 394 U.S. at 582 (emphasis added).

Petitioners have utterly failed to carry their burden to provide a record to this Court showing that the validity of California's Elder Abuse Act was challenged on federal constitutional or federal statutory grounds in the proceedings below. Indeed, as discussed above, no such showing can be made, as the federal questions are now raised for the first time.

Accordingly, the petition for a writ of certiorari must be denied.

## B. The California Elder Abuse Act and the Decision Below are Consistent with the Fourth Amendment.

Even assuming *arguendo* that the federal issues presented here were raised or decided below, review by this Court would not be warranted.

California's Elder Abuse Act, as amended in 1991, is designed to protect the elderly and dependant persons from abuse, neglect, or abandonment. *Delaney v. Baker*, 20 Cal. 4th 23, 42 (1999), *citing* California Welfare and Institutions Code § 15600.[8]

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8. Section 15600, which sets forth the legislative declarations and intent of the Elder Abuse Act provides, *inter alia*:

> The Legislature recognizes that elders and dependent adults may be subjected to abuse, neglect, or abandonment and that this state has a responsibility to protect these persons . . . The Legislature further recognizes that a significant number of these persons have developmental disabilities and that mental and verbal limitations often leave them vulnerable to abuse and incapable of asking for help and protection . . . The Legislature recognizes that most elders and dependent adults who are at the greatest risk of abuse, neglect, or abandonment by their families or caretakers suffer physical impairments and other poor health that place them in a dependent and vulnerable position . . . The Legislature declares that this state shall foster and promote community services for the economic, social, and personal well-being of its citizens in order to protect those persons described in this section . . . The Legislature further declares that uniform state guidelines, which specify when county adult protective

(Cont'd)

The Act provides that any local law enforcement agency employee who provides an agency reporting suspected elder abuse[9] with access to the victim of a known or suspected instance of elder or dependant adult abuse shall not incur civil or criminal liability as a result of providing that access. § 15634(b). In *Easton I*, the State appellate court determined that the immunity set forth in § 15634, provided absolute immunity from claims of trespass and false imprisonment made by the petitioners against medical personnel. 80 Cal. App. 4th at 495-496. In *Easton II*, the court found, under the facts in this case, that this immunity protection extended to the respondent law enforcement officers, who entered without a

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(Cont'd)

> service agencies are to investigate allegations of abuse of elders and dependent adults and the appropriate role of local law enforcement is necessary in order to ensure that a minimum level of protection is provided to elders and dependent adults in each county . . . Therefore, it is the intent of the Legislature in enacting this chapter to provide that adult protective services agencies, local long-term care ombudsman programs, and local law enforcement agencies shall receive referrals or complaints from public or private agencies, from any mandated reporter submitting reports pursuant to Section 15630, or from any other source having reasonable cause to know that the welfare of an elder or dependent adult is endangered, and shall take any actions considered necessary to protect the elder or dependent adult and correct the situation and ensure the individual's safety.

9. Elder abuse can arise a number of ways — physical abuse, neglect, abandonment, isolation, financial abuse, deprivation by a care custodian of necessary goods or services, or other treatment that results in physical harm, pain, or mental suffering. (Welfare and Institutions Code §§ 15610.07, 15610.30, 15610.43, 15610.57, and 15610.63.)

warrant in order to allow medical personnel to remove Winchester.

Petitioners argue that the immunity set forth in § 15634(b) — as written and as applied by the court in *Easton II* — "unconstitutionally deprives elder citizens of their right under the Fourth Amendment to be safe and secure in their own homes." Plaintiffs further assert that the appellate court's interpretation of § 15634(b) "appears an absurd reading in light of Fourth Amendment jurisprudence."

Contrary to petitioners' argument, courts have consistently held that warrantless entry into a home does not violate the Fourth Amendment, where the entry is made necessary by exigent circumstances. *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); *United States v. Robertson*, 606 F.2d 853, 859 (9th Cir. 1979); *Johnson v. United States*, 333 U.S. 10, 14-15 (1948); *United States v. Reid*, 69 F.3d 1109, 1113-1114 (11th Cir. 1995).

In *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) this Court recognized that the most urgent emergency situation excusing police compliance with the warrant requirement is the need to protect or preserve life:

> Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid . . . The need to protect and preserve life or avoid serious injury is justification for what would be otherwise illegal absent and exigency or emergency.

Following *Mincey v. Arizona*, both federal and state courts have consistently upheld warrantless emergency entries and

searches based on endangerment to life. *See, e.g., People v. Ray*, 21 Cal. 4th 464, 470 (1999) (no warrant required when law enforcement rendering "emergency aid"); *United States v. Echegoyen*, 799 F.2d 1271 (1986) (*Id.*); *United States v. Hughes*, 993 F.2d 1313 (7th Cir. 1993) (report of woman and child in danger in crack house); *United States v. Gillenwaters*, 890 F.2d 679 (4th Cir. 1989) (stabbing victim); *United States v. Martin*, 781 F.2d 671 (9th Cir. 1985) (explosion in apartment); *Mann v. Cannon*, 731 F.2d 54 (1st Cir. 1984) (open access to controlled substances by children); *United States v. Riccio*, 726 F.2d 638 (10th Cir. 1984) (medical aid to defendant shot by police); *United States v. Jones*, 635 F.2d 1357 (8th Cir. 1980) (report of gunshots); *United States v. Barone*, 330 F.2d 543 (2d Cir. 1964) (screams in the night); *United States v. Searle*, 974 F. Supp. 1433 (M.D. Fla. 1975) (report of gunshots); *United States v. Hogue*, 283 F. Supp. 846 (N.D. Ga. 1968) (report of dead body); *Johnson v. State*, 386 So. 2d 302 (Fla. App. 1980) (report of dead body); *State v. Carlson*, 548 N.W.2d 138 (Iowa 1996) (missing person); *State v. Butler*, 676 S.W.2d 890 (Mo. 1984) (en banc) (gunshot victim); *State v. Mackins*, 47 N.C. App. 168, 266 S.E.2d 694 (1980) (gunshots); *State v. Max*, 263 N.W.2d 685 (S.D. 1978) (gunshots). *United States v. Brand*, 556 F.2d 1312 (5th Cir. 1977) (noting defendant's concession that police officer who assisted ambulance attendants with medical emergency legally entered home); *United States v. Green*, 474 F.2d 1385 (5th Cir. 1973) (indicating deputy fire marshal could validly search apartment to determine cause of fire where ascertaining cause was necessary to assure fire was completely extinguished); *See generally*, "Emergency Circumstances, Police Responses, And Fourth Amendment Restrictions," *Journal of Criminal Law and Criminology*, Winter 1999 pp. 439-441 (collecting cases involving warrantless entry when person in need of medical treatment).

In short, providing immunity to law enforcement officers entering a home without a warrant in order to assist medical personnel rendering assistance to the victim of a known or suspected instance of elder or dependant adult abuse under § 15634(b) is completely consistent with recognized exceptions to the Fourth Amendment warrant requirement established by this and other courts.

Furthermore, the undisputed facts in this case establish that Deputy Hockabout reasonably believed Winchester was in immediate need of medical attention. Therefore, exigent circumstances existed, obviating the need for a warrant.

### C. The California Elder Abuse Act is Consistent with 42 U.S.C. § 1395cc.

Petitioners' claim that the Elder Abuse Act is somehow inconsistent with the so-called Patient Self Determination Act warrants little discussion.

As discussed above, this issue was neither raised nor decided in the state court proceedings.

In any case, at no time did Deputy Hockabout see Winchester, who had suffered from dementia for many years, act in any fashion to suggest that she was knowingly denying consent. Furthermore, none of the Del Norte County Sheriff's deputies rendered medical treatment, and at no time while hospitalized did Winchester refuse medical care provided.[10]

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10. There is no evidence that, after arriving at the hospital, Winchester declined medical care or otherwise objected to treatment modalities. (*See also, Easton I*, 80 Cal. App. 4th at 323, under the facts alleged in the complaint the California Court of Appeals in Easton I assumed "Winchester was competent to decline to be admitted to the hospital.")

As petitioners acknowledge at page 6 in their petition for a writ of certiorari, the Elder Abuse Act allows any victim of elder or dependent adult abuse to refuse consent. Hence, there is no conflict between the California Elder Abuse Act and 42 U.S.A. § 1395cc. Because there is no conflict between the Elder Abuse Act and the identified federal statute, certiorari must also be denied as to the second issue presented.

## CONCLUSION

For all the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court U.S.
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(3)

No. 01-1735

IN THE

# Supreme Court of the United States

TOM EASTON and ELENA EASTON,
and as successors in interest of decedent
MARGARETHA MARY WINCHESTER,

*Petitioners,*

v.

JIM MAREADY, DEL NORTE SHERIFF;
DEPUTY SHERIFF THOMAS HOCKABOUT;
DEPUTY SHERIFF GERALD HARWOOD;
DEPUTY SHERIFF GARTH GOODRICH;
STEPHAN BROHMER, DIRECTOR DEL NORTE
ADULT PROTECTIVE SERVICES; each in their
individual and official capacity,

*Respondents.*

On Petition For Writ of Certiorari
To The Court of Appeal of the State of California

## REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13 pgs

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## I. CALIFORNIA'S ELDER ABUSE ACT § 15634(b) IS FACIALLY UNCONSTITUTIONAL

### A. California Absolute Immunity Exception

Should respondents prevail in this action, there will be a new and unprecedented exception in the line of Fourth Amendment jurisprudence. Let us name it the California Elder Abuse absolute immunity exception.

This new exception is quite unlike the narrow qualified immunity judicially granted to law enforcement in criminal cases involving discovery of contraband or in administrative searches and seizure such as in child abuse. This new legislative exception does not require exigent circumstances and probable cause to win qualified immunity.

It simply grants absolute immunity.

With this exception law enforcement in California need only point to a medical practitioner's orders or information that an elder or endangered adult is in some medical danger, and then no further exigent circumstance or probable cause is required. No need to knock, just enter forcibly at will, for this exception is absolute.

As in California's mentally ill involuntary commitment statute of 5150, no consent of the patient is required. California's law enforcement now no longer has its hands tied by burdensome adherence to constitutional standards. Its legislature has freed it to enter homes at will with only a medical pretext necessary.

A brave new world? Only if this Court agrees.

**B. Were The Federal Questions Raised Below?**

Respondents assert that the federal questions herein were not raised or addressed below, nor decided by the trial court or court of appeal [Brief:4-7].

Whether the courts below fairly addressed the violations of the Fourth Amendment and the right of a patient to refuse medical treatment does not allow respondents to recklessly argue that these issues are foreclosed from consideration by this Court.

Indeed, long ago this Court held, against similar allegations by defendants:

> " '[T]his court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.' [citation omitted]." *Staub v. City of Baxley*, 355 U.S. 313, 318 (1958).

The record in this case shows that petitioners' First Cause of Action of their complaint fairly stated the violations of the Fourth Amendment:

> "6. Contrary to common law and the laws and the Constitution of the United States, defendants . . . unlawfully without search warrant, entered . . . falsely imprisoning and seizing and removing Peggy Winchester from her bed . . . [ ¶ ] 7. . . thereby violated

plaintiffs' civil rights under the Fourth Amendment." Complaint, CT 2-3.

Petitioners' Second Cause of Action also involved the violation of the Fourth Amendment [CT 3]. In the Third Cause of Action petitioners alleged the Adult Protective Services failed to train and supervise its staff and the Sheriff's Office in the requirements of the Elder Abuse Act, in particular, its requirement of a search warrant, thus implicating the Fourth Amendment [CT 3].

Petitioners continued to raise the Fourth Amendment as their primary issue at every stage [Plaintiffs' P&A in Opposition to Defendants' Motion for Summary Judgement, CT 487-489], including in all the appellate briefs.

The California courts simply chose to ignore all of petitioners' allegations of violations in order to free law enforcement of constitutional constraints.

### C. Facts Must Be Taken In Most Favorable Light To Plaintiffs To Support A Motion For Summary Judgment

If this Court finds that the California legislature could not absolutely immunize law enforcement under § 15634(b), it may then for the issue of qualified immunity determine whether the undisputed facts, taken in the light most favorable to the parties alleging injury, first show that the officers violated a constitutional right, and then whether the right was clearly established in light of the specific context of this case. *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125,

1129 (2202) citing to *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

**D. Exigent Circumstances Apply Only To 5150**

The dilemma avoided by the courts below was how to reconcile the fact that respondents entered and seized Winchester under 5150,[1] alleging the exigent circumstance of medical emergency (but not psychiatric as required by 5150) but respondents then inconsistently asserted absolute immunity under the Elder Abuse Act.

Respondents and the California courts ignored the undisputed fact that the 911 dispatcher told the deputies to pick up Winchester on a 5150 rather than the Elder Abuse Act [CT 332:23-26].

Initially respondents' motion for summary judgment affirmatively defended only on the grounds of 5150. Later, over the objections of plaintiffs, respondents amended their motion to include the affirmative defense of absolute immunity under the Elder Abuse Act.

Respondents belatedly realized that they could never demonstrate compliance with the rigorous requirements of 5150, which requires that the person be transported only to a state approved psychiatric facility, in this case 85 miles away in Eureka, and other procedural matters never followed in this case [CT 525:7-10].

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[1] The Lanterman-Short-Petris Act, California Welfare & Institutions Code §§ 5100 et seq., is an act providing for involuntary commitment of mentally ill persons.

All of deputy Hockabout's observations (his report written down only 12 days later, and his declaration made a year and a half later], of Winchester were couched in terms of 5150's description of a mentally disordered person being gravely disabled rather than in terms of the Elder Abuse Act.

Nor was Winchester ever examined by a psychiatrist as required by 5150. Moreover, the Eureka psychiatric facility for 5150 commitments would have refused to accept Winchester had she been taken there, on the grounds that they would be overwhelmed if patients suffering from dementia or Alzheimer's were to be admitted [CT 525:1-6].

The Elder Abuse Act, at § 15701(d), explicitly precludes its use to "circumvent or supplant the involuntary detention and evaluation process" of 5150.[2]

**E. Disputed and Undisputed Facts**

On October 19, 1998, when nurse Morneau discovered the failure to obtain the prescription for the UTI infection, his irrational and emotional

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[2] "This chapter shall not be used to circumvent or supplant the involuntary detention and evaluation process provided for pursuant to chapter 2 (commencing with Section 5150) of Part 1 of Division 5. A person shall not be deemed an "endangered adult" for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone, in lieu of medical treatment." W & I C § 15701(d).

reaction that Winchester needed hospitalization was based in large part on the fact that it was his own fault, since he himself had on October 13 examined the discharge instruction, which had the prescription to be filled at the bottom of the page, *and failed to note it was intact and unfilled on October 13* [CT 497:25 - 498:3].

Nurse Morneau then further compounded his error by falsely alleging that Easton was refusing aid for his mother, whereas Easton was only insisting that the "easily treatable medical condition" (Respondents' own words, Brief:1] continue to be treated at home in accordance with his mother's express wishes [CT 498:4-14].

The crucial material facts, disputed and undisputed, were then as follows:

1. The sheriff's deputies were directed by 911 dispatcher to go to the home on a 5150 per the doctor's orders [CT 329]. Undisputed.

2. The deputies entered forcibly without consent [CT 498]. Undisputed.

3. Once inside with the EMT's deputy Hockabout determined that in his opinion Winchester was gravely disabled per 5150 [CT 334, 339]. *Disputed by plaintiffs' expert witness former City Police Chief Pottorff and plaintiffs* [CT 526-527; 500-501].

4. Deputy Hockabout ordered the EMTs to transport Winchester to the local hospital, *rather than to the state approved psychiatric facility 85 miles away in Eureka as was required by 5150* [CT 503-504; 479]. Undisputed.

5. Winchester refused her consent to be taken to the hospital, and once there pulled the tubes out

of her nose and thus had her arms restrained to the bed for the next 72 hours before being released to her son [CT 479]. *Undisputed except by Hock bout's declaration, which was opposed by EMT Snow, as well as plaintiffs' declarations of Hockabout 's admission that Winchester did not wish to go to hospital* [CT 503-504; 479; 498].

6. Winchester died 9 days later of functional old age [CT 480]. Undisputed.

7. Deputy Hockabout made his written report 12 days later and his declaration a year and a half later, basing both on 5150, not the Elder Abuse Act [CT 334; 339]. Undisputed.

If exigent circumstances had in fact existed, such as the alleged but unprovable medical emergency for a minor urinary tract infection (UTI), it would then have been a question for the jury, not for the court in the instant motion for summary judgment. *Wallis v. Spencer*, 202 F.3d 1126, 1138, 1141 (9th Cir. 2000).

**F. Hockabout's Declaration Lacked Credibility**

Deputy Hockabout did not simply "allow" [Brief:2, 10], but in fact *ordered* the EMT's to transport Winchester against her will to the local hospital, Sutter Coast Hospital in Crescent City.[3]

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[3] EMT Snow's report stated: "S.C.H. [Sutter Coast Hospital] WAS CONTACTED AND I WAS ADVISED THAT THE DR. WANTED HER [Winchester] TO BE TRANSPORTED AND S.O. [Sheriff's Office] ON SCENE SAID SHE WAS TO BE TRANSPORTED ON THEIR ORDERS ALSO." [CT 503-504].

The EMTs were merely following orders and thus were innocent parties.

Nor did deputy Hockabout ever acknowledge in his written report or his declaration that the EMTs found Winchester responsive and fully aware.

However, upon his departure Hockabout did admit to the Eastons that Winchester did not want to go to the hospital [CT 479, 498].

False details such as the alleged low blood pressure were added by Hockabout more than a year after the fact. In fact, the EMTs were unable to take Winchester's blood pressure as she refused further cooperation after refusing to go to the hospital [CT 503-504]. But as soon as arriving at the hospital her blood pressure was a normal 130/72 with a pulse of 88 [CT 564:7-11].

### G. Protection of the Fourth Amendment

Respondents ignored any direct challenge to the line of administrative search cases in the Ninth Circuit, the latest being *Calabretta v. Floyd*, 189 F.3d 808, 813 (1999), following this Court's holding in *Camara v. Municipal Court*, 387 U.S. 523 (1967). These demonstrate that administrative searches and seizures must follow the requirements of the Fourth Amendment.

Respondents, as well as the court of appeal, relied upon a California case, *People v. Ray*, 21 Cal. 4th 464 (1999). This criminal case involved an open door, providing some reasonable exigent circumstance to give qualified, but not absolute, immunity to the officers.

The holding in *Ray* may be seen as a California aberration directly opposed to this Court's Fourth Amendment jurisprudence (as was noted by dissenting Judge Mosk, now deceased, referring to *Payton v. New York*, 445 U.S. 573, 575, 585 (1980)), as well as to the Ninth Circuit line of cases.

## II. THE PATIENT'S BILL OF RIGHTS, AS WELL AS THE ELDER ABUSE ACT ITSELF, ALLOWS ANY VICTIM TO WITHHOLD CONSENT

Respondents assert that the issue was not raised below, but the record is clear: petitioners raised the issue of consent by alleging violation of the Fourth Amendment's prohibition against warrantless seizure of the person [CT 2-3].

Further, in the trial court petitioners also referred to the handouts of Sutter Coast's own patient bill of rights[4] and noted that they were required by the provisions of the federal Patient Self Determination Act, Public Law 101-508 [Plaintiffs' P&A in Opposition to Defendants' MSJ, CT 495:15-22].

The Elder Abuse Act itself provided that any alleged victim of elder abuse may refuse or withdraw consent [§ 15636(a), cited in Petition for Certiorari at 6]; but that cannot make § 15634(b) thereby constitutional, as respondents assert.

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[4] The Sutter Coast Hospital to which Winchester was taken had the week before provided her with a written statement of her right to refuse:

> "You can say no to any treatment you don't want - - even if the treatment will keep you alive longer." CT 506.

## III. CONCLUSION

All elders in California are still in jeopardy of being arbitrarily seized, even out of their own homes, and forced into unwanted medical treatment at the whim of any law enforcement officer, in violation of the Fourth Amendment and 42 U.S.C. § 1395cc(f)(1)(A)(i).

> "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter--all his force dares not cross the threshold of the ruined tenement!" [Attributed to Pitt, 1763]. *Miller v. United States*, 357 U.S. 301, 307 (1958)

Petitioners request that this Court grant this Petition for Writ of Certiorari to the California Court of Appeal.

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Respectfully submitted,

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